SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1712

MARINA MANAGEMENT CORP.,

Petitioner,

-against-

JOHN D. BREWER, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
(Docket No. 77-7322)

JAMES V. JOY, JR.,
Attorney for Petitioner
10 East 40th St.
New York, N.Y. 10016
(212) 685-2410

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES

OTHER AUTHORITIES

STATUTES

INDEX TO APPENDIX

Index to Appendix

SUPREME COURT OF THE UNITED STATES

October Term. 1977

No.

MARINA MANAGEMENT CORP.,

Petitioner,

-against-

JOHN D. BREWER, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (Docket No. 77-7322)

Petitioner Marina Management Corp. prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit, which upheld the Order of the United States District Court for the District of Connecticut granting summary judgment to Respondent in the suit by Petitioner for a commission on the abortive sale of a business' assets on the ground that certain of those assets were real estate and Petitioner did not have a Connecticut Real Estate Broker's license.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit has not yet been reported. It is set forth in full beginning at 2a. The opinion of the United States District Court for the District of Connecticut is not reported. It is set forth in full beginning at 13a.

Jurisdiction

The Judgment of the Court of Appeals for the Second Circuit as aforesaid was made and entered on March 2, 1978. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1)

Questions Presented

After Petitioner took a deposition and Respondent took three depositions, and documents were furnished Respondent by Petitioner and a third party, Respondent moved for summary judgment on two grounds, one of which was that Petitioner lacked a Connecticut Real Estate Broker's license as required by Connecticut General Statutes Sec. 20-325a, which is set forth at 19a.

Respondent cited no Connecticut cases in support of such contention but cited cases following *Kenney v. Paterson Milk & Cream Co.*, 110 N.J.L. 141, 164 A. 274 (1933), which holds that if a significant amount of real estate is involved in the sale of assets of a business, a business broker cannot recover a commission thereon unless he holds a New Jersey Real Estate Broker's license.[1]

Relying on statutory language that differed from that of New York, *Kenney* reached the opposite result from that reached earlier by the New York Court of Appeals in *Weingast v. Rialto Pastry Shop, Inc.*, 243 N.Y. 113, 152 N.E. 693 (1926), which had announced a New York rule permitting business brokers to recover commissions on sales of assets of a business even though significant real estate was among such assets. The cases, after 1926, cited by Respondent in his summary judgment motion discussed *Weingast* but Respondent saw fit to ignore *Weingast*.

In answering Respondent's summary judgment motion, Petitioner cited and relied upon *Weingast*. Respondent's reply was that even under *Weingast*, Respondent should be granted summary judgment.

No Connecticut case has made a selection between *Kenney* and *Weingast*. Prior to the opinions that are the subject of this Petition, eight jurisdictions have followed *Kenney*

---

1. The opinion of the Court of Appeals characterizes the New Jersey Rule, which was announced by *Kenney*, as requiring a Real Estate license if *any* real estate is among the assets sold, 11a. Such belief was also expressed in the District Court opinion, 16a. Such belief is refuted *infra*

and six have followed *Weingast*

Petitioner conceded that if the Court for the District of Connecticut predicted that Connecticut State Courts would follow *Kenney*, the District Court should decide the motion for summary judgment in Respondent's favor but proceeded vigorously to contest facts that would not allow it to invoke *Weingast*.

The District Court found that even under *Weingast*, Petitioner would not recover.

At the Court of Appeals, Respondent again changed its position and argued that there was no difference between the *Kenney* New Jersey and the *Weingast* New York rules. Such belief was accepted by the Court of Appeals for the Second Circuit. It had become necessary because Respondent's attorney was asked at oral argument whether Respondent would continue to operate the Stratford Marina – whose assets were the subject of the agreement of sale – and answered "yes", an answer that was tape recorded on a tape that is available to this Court from the Clerk of the Court of Appeals for the Second Circuit. The lower court judge, Jon O. Newman, of the Court for the District of Connecticut, had said ". . . the contemplated sale was for real assets and not for a going business, . . ."16a. As Judge Newman agreed with Respondent that Petitioner could not even recover under the New York rule, so the Court of Appeals for the Second Circuit agreed with Respondent that there is no difference between the New York and New Jersey rules.10a. The Court of Appeals opinion was written by the only Connecticut member of the three-judge panel, Judge Meskill, the others being New York members, Judges Friendly and Gurfein, who had found difficulties with Respondent's oral argument.

1. Did the District Court of Connecticut have the right to predict Connecticut law, in the subject diversity of citizenship case, without granting Petitioner a trial on the merits and without having the benefit of the transcript of such trial?

2. Should brokers of businesses, which operate in

interstate commerce. in order to be paid commissions on the sales of assets thereof. part of which the law deems real estate. be required to hold a state real estate broker's license when the sale is of a business that will be continued by the buyer?

3. Did the District Court grant summary judgment so improperly as to require a necessary inference that it was unconsciously striving to avoid a trial of what it perceived would be a complex civil case?

4. Have so many egregious errors and gaps of reasoning and logic occurred at the District Court and Court of Appeals as to constitute departures "from the accepted and usual course of judicial proceedings" calling for exercise by t'is Court of its power of supervision?

Constitutional Provision, Statutes and Federal Rule Involved

The Constitutional Provision, Statutes and Federal Rule involved are the Fifth Amendment to the United States Constitution, Connecticut General Statutes Annotated Secs. 20-311 (a) and (b), 20-312, 20-325, 20-325a(a), New Jersey Statutes Annotated 45:15-1, 45-15-2 and 45-15-3, New York Real Property Law Sec. 440, 440-a, 442-d and 442-e(1), and Federal Rule of Civil Procedure and are printed at 18a-24a, *infra*.

Statement of the Case

A business broker, Petitioner sued Respondent for failing to consummate purchase of the assets of the Stratford, Connecticut, Marina, a corporation, after Respondent had prevailed on Petitioner and Stratford Marina to allow him to be liable for the commission.

Petitioner did not hold a Connecticut Real Estate Broker's license.

Stratford Marina asked Petitioner to appraise its assets and Petitioner furnished an appraisal of $1,496,000 to Stratford Marina on Jan. 30, 1974 (R.O. Palmer[2] Dep. Ex. 5, Ct. App.Appx. 119), 17 months before Respondent's $120,000 offer (Ct.App.Appx. 23).

~~Stratford Marina asked Petitioner to appraise its assets an appraisal of $1,496,000 to Stratford Marina on Jan. 30, 1974, 17 months before Respondent's $120,000 offer to purchase such assets~~.

The appraisal was broken down as follows:

Land	$394,000
Buildings	590,487
Dredging	7,500
Bulkheads	152,000
Fill, Grading, Blacktop	32,200
Travelift Slots,etc.	32,000
Piers, Floats, etc.	173,400

or a total of $1,381,587 of the $1,496,00 being attributed to what the law would consider real estate.

Before the Court of Appeals, Petitioner argued that of Respondent's offer of $1,200,000, only 25% thereof could be attributed to nonbusiness real estate—the land, from which there should reasonably be deducted $94,000 as the cost of demolishing the business, *marina*, improvements to the real estate (Pet. Ct.App. Oct. 5, 1977 Reply Brief 17, Ct.App. Tape of Oral argument).

Before the Court of Appeals, Petitioner argued that the reliance of the District Court upon the presence of good will in the *Weingast* case was not followed in *James v. Alderton Dock Yards*, 232 App.Div. 675 (N.Y. 2d Dept., 1928, whose lower court file revealed that Alderton Dock Yards had suffered a $105,000 loss in the year before the sale of its assets.

---

2. President and sole stockholder of Stratford Marina, Inc.

The actions of the District Court of Connecticut and the Court of Appeals have been stated in the preface to "Questions tions Presented." *supra*.

REASONS FOR GRANTING THE WRIT

The aspects relied upon by Petitioner for review by this Court–inadequacy of record to support the prediction of state common law in the absence of reported cases of the state on the area of the law to be predicted, abuse of the Federal summary judgment rule (Rule 56, FRCP), errors of the lower courts departing from judicial custom requiring exercise by this Court of its power of supervision–provide a foundation on which this Court can salvage an unsophisticated, illogical and result-oriented treatment of a commercial problem unusually important to each of the states and to the Federal government. That problem, ability freely to broker the sale of businesses, is a *national* problem necessarily affecting interstate commerce and thus, it is submitted, is a problem of Federal concern.

I.

THE DISTRICT COURT OF CONNECTICUT SHOULD NOT HAVE PREDICTED CONNECTICUT LAW, IN THE SUBJECT DIVERSITY OF CITIZENSHIP CASE, WITHOUT GRANTING PETITIONER A TRIAL ON THE MERITS AND HAVING THE BENEFIT OF THE TRANSCRIPT OF SUCH TRIAL

As will be hereinafter clearly seen, the business broker real estate problem has been addressed by 16 jurisdictions, many of which have issued series of reported cases discussing the problem in a number of its facets. State real estate broker laws nowhere are embodied in a uniform act and thus vary in language. In fact, Petitioner's counsel was stunned to learn that the real estate broker laws of each of the states are not

to be found in any volume or volumes comprising a single book.

To begin with, the court for the District of Connecticut and the Court of Appeals utilized a serious misinterpretation of a series of non-Connecticut cases to predict Connecticut law, In the opinions Judge Newman of the Connecticut District Court, wrote

> Defendant responds by citing cases in other jurisdictions that adhere to the so-called "New Jersey rule," which bars an unlicensed broker's recovery of a commission if the disputed transaction involved *any* real estate.
>
> (16a, *infra*)

and Judge Meskill of the Court of Appeals wrote

> The "New Jersey rule" can be stated in even briefer fashion: it appears to hold that a broker lacking a real estate broker's license may not recover a commission if the transaction involves *any* real estate.
>
> (11a, *infra*).

The only case cited by Judges Meskill (11a, *infra*) and Newman (16a, *infra*) as constituting the New Jersey rule was *Kenney v. Paterson Milk & Cream Co.*, 110 N.J.L. 141, 164 A. 274 (1933), in which the share of assets sold that was real estate was "one-third". 164 A. at 275. Although parties in their briefs to the District Court and the Court of Appeals discussed cases reported from eight other jurisdictions as comprising the "New Jersey rule"–*Bonasera v. Roffe*, 8 Ariz. App. 1, 442 P.2d 165 (1968); *Abrams v. Guston*, 110 Cal.App.2d 556, 243 P.2d 109 (1952); *Thomas v. Jarvis*, 518 P.2d 532 (Kansas, 1974); *DeMetre v. Savas*, 93 Ohio App. 367, 113 N.E.2d 902 (1953); *Schultz v. Palmer Wellcot Corp.*, 115 F.Supp. 939 (E.D.Pa.), 207 F.2d 652 (3d Cir., 1953); *Hall v. Hard*, 160 Tex. 565, 335 S.W.2d 584 (1960); *Gammer v. Skagit Valley Lumber Co.*, 162 Wash. 677, 299 P. 376 (1931); *Payne v. Wolkman*, 183 Wis. 412, 198 N.W. 438 (1924) –neither Judge Meskill nor Judge Newman seems to have fa-

miliarized himself with the content of those opinions, *none* of which requires of a business broker a real estate broker's license where real estate assets of the business are *nominal* in amount.

Neither judge seems to have comprehended the scope of possible factual situations presented by the question of the business broker's relationship to real assets of a business being sold or attempted to be sold. The proportion of such assets can be *wholly absent, nominally present, present in* significant *amount*, and *present in* dominant *amount*. Respondent and Judges Meskill and Newman have not even given consideration to the problem of assets of a business, deemed by the law to be real estate, that are unrelated to the business being sold. at least as of the time of the sale.

Petitioner believes an example will make clear the fallacy of the "not . . . *any* " interpretation of the New Jersey rule, a contention which Respondent never urged on either Judge Meskill or Judge Newman. Assume the assets of a multi-state corporation are brokered to a still larger multi-state corporation and that the selling corporation has assets in 20 states, it is likely that real estate will be involved in a few as six of the states for one reason or another–office buildings, parking lots, leases, etc.– and that their value is as little as 4% of the total value of the assets being sold. Nothing in the decisions of the "New Jersey rule" states suggests that such presence would deprive a business broker of his status where the buyer would be continuing the business of the seller.

The following quotation from *Dodge v. Richmond*, 5 App. Div.2d 593, 173 N.Y.S.2d 786, 788 (1st Dept., 1968), one of the "New York rule" decisions, shows the divergence of the "New York" and "New Jersey" rules:

> And this is true even though such item [of real estate] may be a *significant* though not a *dominant* feature of the transaction.
>
> (Italics added).

Petitioner submits that the term *significant* defines the "New Jersey rule" and the term *dominant* defines the "New York rule," an articulation accepted by the adherents of either of the rules, who must be surprised by the "not . . . *any*" language of the opinions of both lower courts in this case.

Furthermore, both of the lower courts in this case took terms from the "New York rule" line of cases such as "dominant," "incidental feature," "exploits" and "chief object" as they refer to assets among those of a business being sold that the law says are real estate, and applied them to Respondent's agreement to purchase the assets of Stratford Marina *in isolation from the factual situations* present in each of the "New York rule" line of cases. How these terms should have been applied to the instant case required a record in which full litigation of facts was made available to the parties.

If the District Court had *denied* summary judgment and conducted a trial on the merits before it undertook to predict Connecticut law neither it nor the Court of Appeals would have fallen into the serious, "not . . . *any*", error.

The District Court and the Court of Appeals could bring neither of themselves to choose for Connecticut between the "New York" and "New Jersey" rules. Contrary to all logic, both courts mereged together the two rules–producing a miracle akin to blending water and oil into a single liquid when one or the other of those courts should have ordered a full trial on the merits.

When Federal courts predict state law, in response to to motions for summary judgement, on insufficiently developed facts, they produce judicial precedents that unreasonably interfere with the state judicial processes. The "New York" rule can be likened to St. Peter's Basilica in Rome opposing the Eastern Orthodox Cathedral of St. Sophia in Constantinople, which can be likened to the "New Jersey" rule–both consituting evolutions of the intellect. In two incisive blows the lower courts have destroyed both intellectual fabrics in fits of nihilism to serve the holy altar of summary judgment. The states deserved better treatment at the

hands of the lower courts, which, it is to be hoped, have only hurt themselves and Petitioner.

What has occurred in this case can and should be reversed by this Court.

II.

BROKERS OF BUSINESSES, WHICH OPERATE IN INTERSTATE COMMERCE, IN ORDER THE BE PAID COMMISSIONS ON THE SALES OF ASSETS THEREOF, PART OF WHICH THE LAW DEEMS REAL ESTATE, SHOULD NOT BE REQUIRED TO HOLD STATE REAL ESTATE LICENSES, WHEN THE SALE IS OF A BUSINESS THAT WILL BE CONTINUED BY THE PURCHASER

Among the states whose courts have considered disputes over whether brokers of assets of businesses, some of which are real estate in the contemplation of the law, there is agreement that the New York rule is the more reasonable. The "New York rule" states have adopted their rule because of its reasonableness. *Weingast v. Rialto Pastry Shop*, 243 N.Y. 152 N.E. 693 (1926); *Frier v. Terry*, 230 Ark. 302, 323 S. W.2d 415 (1959); *Cary v. Borden Co.*, 130 Colo. 344, 386 P.2d 585 (1963); *Hughes v. Chapman*, 272 F.2d 195 (5th Cir., predicting Alabama law); *Ciricelli v. Braunstein*, 165 F. Supp. 168 (D.Del., 1960); *Abramson v. Gulf Coast Jewelers & Specialty Co.*, 445 F.2d 802 (5th Cir. predicting Florida law). The New Jersey rule states have considered themselves constrained by statutory language, over and above the usual real estate brokers' statutes, which they, reluctantly, could not avoid.

The life of the common law is in the holdings of the cases comprising it as understood in the light of the facts determined in those cases. The process is rarely that of a digital computer or that, for example, of manufacturing precisely dimensioned die cast components but most often is one of trends, momentums and tendencies. The key factors for application of the New York rule are the relationship of assets to the business and whether the buyer is going to continue the business being sold. Whatever the process is it is not a first or second year law course in raw land and accession to raw land of improvements of improvements such as buildings and immovable equipment.

Respondent's zeal for summary judgment closed his mind to such truths and his quasi-demagoguery (appeal to a desire for easy disposal of arduous litigation) lulled Judges Newman and Meskill into closing their minds to such truths.

The only reported cases in which New York Courts have not allowed a broker of a business to invoke the New York rule have involved hotels, *Reed v. Watson*, 244 App.Div. 522, 279 N.Y.S. 863 (4th Dept. 1935), *Sorice v. DuBois*, 25 App. Div. 2d 521, 267 N.Y.S.2d 227 (1966), an apartment mortgage, *Baird v. Krancer*, 138 Misc. 360, 246 N.Y.S. 85 (N.Y. Co. Sup. Ct., 1930), and the stock of F.H.A. corporations, *Kislak v. Carol Management Corp.*, 7 App.Div. 2d 428, 184 N.Y.S.2d 315 (1st Dept., 1959). The only case before that of the parties hereto in the United States involving a maritime business was decided in New York and was favorable to the business broker. *James v. Alderton Dock Yards*, 232 App. Div. 675 (2d Dept., 1928). The facts in the *Alderton Dock Yards* case are almost identical to the facts of this case. Papers on Appeal, ~~*Smith*~~ James *v. Alderton Dock Yards*, A834, pp7, 11-14.

As indicated at page 4, *supra*, all of the assets of Stratford Marina, were business assets.

States following the New Jersey rule have done so for one or more of four reasons:

a) The state has in its statute an express "single act" bar. *Kenney v. Patterson Milk & Cream Co., supra; DeMetre v. Savas, supra; Palmer v. Wellcot*

Tool Corp., supra; Abrams v. Guston, supra; Hall v. Hard, supra.

b) Brokering real estate without a license is not a crime. *Kenney v. Paterson Milk & Cream Co., supra.*

c) Perception that it is will follow a majority rule. *Thomas v. Jarvis, supra; Bonasera v. Roffe, supra.*

d) Unawareness of *Weingast v. Rialto Pastry Shop, supra. Payne v. Wolkman, supra* (decided two years earlier); possible unawareness of *Weingast* which is not referred to. *Grammer v. Skagit Valley Lumber Co., supra.*

Connecticut does not have "one act" language and its statute 19a *infra*, makes the brokering of real esate without a license be a crime.

In using the term "dominant", New York rule states were referring to the presence of non-business real estate among the assets of a business being sold and would allow such presence provided it was not disproportionate.

The probability is that Connecticut courts will follow the New York rule—unless they become influenced by the opinions of Federal courts in this case. The opinion of the Court of Appeals by Judge Meskill boils down to four premises:

1. The "not . . . *any*" interpretation of the New Jersey rule, earlier herein demonstrated to be a misinterpretation.
2. New York rule states would deny commissions on the transaction where a majority portion of assets are used in the business but are what rules of real estate law would call real estate, earlier herein demonstrated to be refuted by the *results* in New York rule cases.

3. "The inference to be drawn from this decision, *United Interchange, Inc. v. Spellacy*, 144 Conn. 647, 136 A.2d 801 (1957)], *of course*, is that a company providing services similar to those provided by Management would be denominated a 'real estate broker' for purposes of Conn. Gen. Stat. Sec. 20-311(a)" 6a, *infra* (noncitation italics added), which is a nonsequitur.
4. "[D]uring its consideration of these statutory provisions, the Connecticut legislature was aware of the practice of brokering the purchase and sale of commercial and industrial properties" 10a, *infra.*

The first comment on the fourth premise is that Judge Meskill does not see a difference between commercial real estate and the sale of a going business, a difference critical to the New York rule. No one supporting the New York rule has ever said that sale of a rifle ammunition plant (for example of Remington Arms in Bridgeport after the First World War) for use by an electrical manufacturer (General Electric) would be considered the sale of a business. This is the province of commercial real estate brokers, who must have real estate licenses. Furthermore, the legislative documents cited by Judge Meskill state that less protection is needed for the parties to sales of industrial properties than to sales of private homes! Finally, the legislative documents referred to by him concerned amendments to the real estate brokers statute whose provisions pertinent to this litigation had been 18 years before.

It seems clear that Judges Friendly and Gurfein, out of diplomacy, deferred to Judge Meskill as the only Connecticut member of the panel, to do the prediction of Connecticut law and did not critically examine his opinion or examine the documents and cases cited by him.

As much as the Federal courts want to relegate real property questions to the states, they are unable completely to do so. Wherever citizens of the United States pursue their lives within our borders, they do so on—or over, when in air-

planes–real estate. The human rights accorded them by the Federal government can be denied them by the making of real property distinctions.Commercial ventures by citizens function on real estate. Sales of their assets, more often than not, will involve real estate. The strict legalisms of real property should not be looked to for identification of those assets as real property for application of the statutes requiring brokers to have real estate brokers licenses.

Reasonable case law has grown up in the United States among several of the states not so requiring and that line of cases, the New York line, should be applied by Federal courts to states that have not expressly adopted the New Jersey rule or have the language of New Jersey Statutes Annotated 45:15-2 coupled with noncriminal penalties for brokering real estate without a license. When Connecticut adopted its real estate brokers law in 1953, the sponsor said:

> This bill is similar to, although not nearly as far reaching and inclusive as real estate licensing acts which have been adopted in thirty-nine states, the District of Columbia, Hawaii and four provinces of Canada . . . [p2365] . . . The *laws* of *all* the other states which have real estate bills were studied . ; . [p2367].
>
> Connecticut General Assembly
> Transcript of May 20, 1953
> Pages 2365-2370.

It must therefore be presumed that Connecticut's legislators were aware of the New York and New Jersey rules and chose not to adopt NJSA 45:15-2 language to assure adherence to the New Jersey rule.

Predictions should be made on probabilities not slim possibilities. The probabilities have been ignored by the lower courts herein.

This Court should reverse and order a trial on the merits.

III.

THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT

Without predicting adoption by the Connecticut courts of the New Jersey rule, the District Court should not have granted summary judgment and the Court of Appeals should not have affirmed.

Petitioner's Statement of Undisputed Facts had said:

> 4. Real property constituted a significant part of the business assets of Stratford Marina, Inc., and exceeded 20% thereof (A67).

The District Court, in finding realty of Stratford Marina to be "dominant" was finding a material fact as to which there was a genuine dispute. Accordingly, the Court of Appeals improperly upheld the District Court's granting of summary judgment.

Furthermore on the branch of Rule 56 allowing summary judgment to be granted as a matter of law, both courts misconstrued the law of all the states, conforming to the New Jersey rule, as denying a business broker a commission on the sale of assets of a business *any* of which are real estate.

The granting of summary judgment by the District Court is explanable only in terms of avoidance of what that court believed would be a complicated commercial trial, especially as it would involve research into the statutes and court decisions of over 15 states.

IV.

SERIOUS ERRORS AND GAPS OF REASONING AND LOGIC OCCURRED AT THE DISTRICT COURT AND COURT OF APPEALS CALLING FOR EXERCISE BY THIS COURT OF ITS POWER OF SUPERVISION

The statements in the opinions of the lower courts that the New Jersey rule decisions deny commissions to brokers of assets of a business, which include any real estate have been demonstrated to be erroneous at 7-8, *supra*.

The District Court expressly held that the Stratford Marina agreement was not for sale of a going business. 16a.

In its opinion, the Court of Appeals failed to note Respondent's concession at taped oral argument that Respondent would have continued to operate the Stratford Marina as a business. Such tape can be obtained from the Clerk of the United States Court of Appeals for the Second Circuit.

The Court of Appeals failed to note in its opinion that Petitioner had acted as broker in the sale to Respondent of the assets of four boat yards and the capital stock of one marina, all of which he continues to operate as marinas (A107-A108) and inferences to be drawn from pleadings that include a counterclaim by Respondent for failure of Petitioner to have a license as real estate broker of one of the earlier marinas).

Reference is made to the earlier analysis of four premises for the opinion of the Court of Appeals 12-13 *supra*, and the errors cited therein, especially the reliance on *United Exchange* case (No. 3) as being a nonsequitur and the citation of Connecticut legislative documents (No. 4) as being inapposite.

The opinion of the Court of Appeals failed to reflect Petitioner's argument to it that to render Stratford marina non-Marina real estate its appraised land value of $394,000 would require reduction to $300,000 or only 25% of Respondent's offering price. 5, *supra*. The significance of the 25% was that it qualified the case for application of the New Jersey rule as being significant real estate- Petitioner believes as little as 15% would- but does not make Stratford Marina's real estate, in the technical sense, be dominant for application of the New York rule. It should be borne in

mind that Petitioner's position is that all of Stratford Marina's assets, technically real property included, are business assets within the meaning of the New York rule and are not dominant and that the rule really only applies to presence within assets of the business being sold of non-business-related real estate.

These concepts are not hard to follow unless someone has a vested interest in not wanting to understand them..

With respect to the issue of good will, the Court of Appeals opinion failed to reflect Petitioner's argument that Alderton Dock Yards lost $105,000 in the year before it was sold and yet the New York rule was applied in *James v. Alderton Dock Yards, supra*.

The statutes of the various states dealing with real estate brokers contain varying language and the reported cases involve a variety of facts, as was pointed out at 6-7, 8-9, *supra*. In order to compare this case with those statutes and cases, the District Court should have allowed a trial on the merits, in order, in a sufficiently informed way, to predict Connecticut law. Part I, *supra*.

It is fair to say that the District Court's reasoning became clouded by its desire to avoid trial of a complex commercial case.

CONCLUSION

Petitioner had a right to a trial on the merits. Summary judgment was improperly granted to Respondent, denying to Petitioner its rights to due process of law under the Fifth Amendment to the United States Constitution. The Petition for Certiorari should be granted and either summarily or after full briefs and argument before this Court, a trial on the merits should be ordered at the United States District Court for the District of Connecticut.

Respectfully submitted,

JAMES V. JOY, JR.,
Attorney for Petitioner
10 East 40th St.
New York, N.Y. 10016
(212) 685-2410

APPENDIX

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of March one thousand nine hundred and seventy eight.

Present:

Hon. Henry J. Friendly
Hon. Murray I. Gurfein
Hon. Thomas J. Meskill

Circuit Judges.

Marina Management Corp., Plaintiff-Appellant v. John D. Brewer, Jr., Defendant-Appellee.	77-7322

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION THEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk
By *Arthur Heller*
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 236—September Term, 1977.

(Argued October 26, 1977 Decided March 2, 1978.)

Docket No. 77-7322

MARINA MANAGEMENT CORP.,

Plaintiff-Appellant,

v.

JOHN D. BREWER, JR.,

Defendant-Appellee.

Before:

FRIENDLY, GURFEIN and MESKILL,

Circuit Judges.

This is a diversity action commenced by plaintiff-appellant Marina Management Corp. in the United States District Court for the District of Connecticut, Jon O. Newman, *Judge*, to recover a brokerage commission arising out of an aborted sale of a Connecticut marina. The district court granted a motion for summary judgment in favor of defendant-appellee John D. Brewer, Jr., on the ground that Management was not a licensed real estate broker as required by Connecticut law. Conn. Gen. Stat. §§ 20-311(a) and (c), 312, 325a(a).

Affirmed.

JAMES V. JOY, JR., New York, New York, *for Plaintiff-Appellant.*

HARVEY J. ROTHBERG, Stamford, Connecticut, *for Defendant-Appellee.*

MESKILL, *Circuit Judge:*

This diversity action was commenced by plaintiff-appellant Marina Management Corp. ("Management") in the United States District Court for the District of Connecticut to recover a brokerage commission arising out of an aborted sale of a Connecticut marina. Judge Jon O. Newman granted a motion for summary judgment in favor of defendant-appellee John D. Brewer, Jr., on the ground that Management was not a licensed real estate broker as required by Connecticut Law. Conn. Gen. Stat. §§ 20-311(a) and (c), 312, 325a(a). Final judgment has been entered pursuant to Fed. R. Civ. P. 54(b). We affirm.

Management is a New York corporation engaged in the business of brokering the purchase and sale of boatyards and marinas. It is licensed to do business in Connecticut, but it is not licensed as a Connecticut real estate broker. In late 1973, Management contracted with Stratford Marina, Inc. ("Marina") of Stratford, Connecticut, to appraise the "physical assets" of Marina. This appraisal was to be of "all of the physical assets of the marina including land, buildings, docks, piers, floats, electrical, water, sanitary, blacktop, dredging, etc.," as well as yard and shop tools and office and showroom equipment and installations. On December 19, 1973, Management submitted an appraisal of $1,322,000. On January 30, 1974, after discussions between Management and R. O. Palmer, owner of Marina, regarding the value of the real estate and Marina's main building, this appraisal was adjusted to $1,496,000. On February 11,

1974, Management and Marina executed a listing agreement giving Management the exclusive right to offer one-half of the marina at Stratford for sale at $850,000 and authorizing Management to negotiate the leasing of the other half. The agreement stated that the sale price was for a portion of the assets of Marina previously appraised by Management. Marina agreed to pay Management a brokerage commission of ten percent of the total sales price.

In March, 1974, Management contacted defendant-appellee Brewer, a Connecticut resident who had previously purchased marinas through Management. Brewer made two offers to purchase one-half of Marina's physical assets, but Marina rejected them. A third offer was acceptable to Marina, however, and a purchase agreement was drafted in early 1975. At one point, the proposed contract referred to the "good will" and trade name of Stratford Marina, but these references were deleted when Brewer insisted that he was purchasing the physical assets and not the corporation. In April, 1975, negotiations between Marina and Brewer broke down, and Marina instructed Management "to cease any further negotiations with Mr. Brewer." Marina also terminated its exclusive listing agreement with Management, leaving Management with only a verbal understanding that it could, on a non-exclusive basis, negotiate the sale of the marina.

Eventually, Marina decided to offer the entire marina for sale for $1,500,000. Despite Marina's instructions, Management had continued to negotiate with Brewer regarding the Marina listing and, in September, 1975, forwarded Brewer's offer to pay $1,200,000. As with the other offers by Brewer, however, negotiations broke down and the sale never took place.

At the heart of the instant dispute are Management's allegations that on or about March 15, 1974, Brewer agreed

to assume the obligations of Marina with regard to Management's brokerage commission and that, at some point during the negotiations, Marina actually accepted Brewer's last offer. Thus, Management argues that Brewer owes $120,000 in brokerage fees; in the alternative, it argues that it is entitled to $100,000 on the theory of quantum meruit. The district court granted summary judgment in favor of Brewer based on his argument that Management was barred, under Conn. Gen. Stat. § 20-325a(a), from recovering a commission on the attempted sale of the marina because it did not have a Connecticut real estate broker's license as required by Conn. Gen. Stat. § 20-312.[1] We affirm the judgment of the district court.

The responsibility of the federal courts in a diversity action is to determine and apply the law of the state in which the federal trial court sits. *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). Unfortunately, the Connecticut courts have not determined whether or in what circumstances a broker who negotiates or attempts to negotiate the transfer of a business' physical assets is a "real estate broker" for purposes of § 20-311(a).[2] The silence of Connecticut's

---

1 Brewer also defended by arguing that he had not agreed to assume Marina's commission obligations and that, in any event, Management's commission was contingent upon the parties reaching a final agreement. The district court found that resolution of these matters turned on disputed facts, and so correctly declined to use them as grounds for summary judgment.

2 The Connecticut court's decision in *United Interchange, Inc.* v. *Spellacy*, 144 Conn. 647, 136 A.2d 801 (1957), does not answer the question presented here. There, United Interchange, a New York corporation not licensed to do business in Connecticut, successfully challenged as unconstitutional a 1955 amendment to the real estate broker licensing statutes that included its business within the definitions of "real estate broker" and "engaging in the real estate business." Rather than being a broker, however, United was a publisher. Its business consisted of soliciting the names of businesses and property owners who were interested in selling, leasing, or making an exchange of their business enterprises or properties and, for a price, listing them in periodicals called

courts, however, neither releases us from our responsibility nor lightens our burden. *See Meredith* v. *Winter Haven*, 320 U.S. 228, 234 (1943). In such circumstances, we must "do the best we can in estimating 'what the state court would rule to be its law.'" *Holt* v. *Seversky Electronatom Corp.*, 452 F.2d 31, 34 (2d Cir. 1971), *quoting Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 209 (1956) (Frankfurter, *J.*, concurring); *see Storke* v. *St. Johnsbury Trucking Co.*, 443 F.2d 89, 91 (2d Cir. 1971); *Locke Manufacturing Cos.* v. *United States*, 237 F.Supp. 80, 85-86 n.8 (D. Conn. 1964) (Timbers, *J.*). Here, we are unaware of any State procedure by which we could certify this question to the Connecticut courts, *compare* Fla. Stat. Ann. § 25.031 and Fla. App. R. 4.61, and the determination of Connecticut law is not sufficiently difficult to warrant remitting the parties to those courts. *See Lehman Brothers* v. *Schein*, 416 U.S. 386, 390-91 (1974), *vacating Schein* v. *Chasen*, 478 F.2d 817 (2d Cir. 1973), *after remand*, 519 F.2d 453 (2d Cir. 1975); *Meredith* v. *Winter Haven*,

"Buyer's Digest" and "Broker's Bulletin." These periodicals were in turn distributed free of charge to chambers of commerce, public libraries and various real estate and business opportunity brokers. The court determined that the inclusion of United's business in the statutory definitions violated the due process and equal protection provisions of the federal and state constitutions. It based its decision on the nature of United's business:

> United's business is primarily advertising. . . . It does not appear . . . that [United's] salesmen advise as to price and for that reason should have some knowledge of real estate values, nor that they direct or assist in the negotiations between the interested parties and so must know something about real estate incumbrances, taxes, zoning and other regulations, and other similar factors involved in a real estate deal. . . . The terms of payment prescribed by United are such that its salesmen have no occasion to handle its customers' funds.

144 Conn. at 655-56, 136 A.2d at 805. The inference to be drawn from this decision, of course, is that a company providing services similar to those provided by Management would be denominated a "real estate broker" for purposes of Conn. Gen. Stat. § 20-311(a).

supra, 320 U.S. at 234; *cf.* Comment, The State Advisory Opinion Perspective, 44 Fordham L. Rev. 81, n.3 (1975).

Brewer's statutory defense is based primarily upon Conn. Gen. Stat. § 20-325a(a), which provides as follows:

> ACTIONS TO RECOVER COMMISSIONS ARISING OUT OF REAL ESTATE TRANSACTIONS
>
> (a) No person who is not licensed under the provisions of this chapter, and who was not so licensed at the time he performed the acts or rendered the services for which recovery is sought, shall commence or bring any action in any court of this state . . . to recover any commission, compensation or other payment in respect of any act done or service rendered by him, the doing or rendering of which is prohibited under the provisions of this chapter except by persons duly licensed under this chapter.

There is no question that Management did not have a Connecticut real estate broker's license when it attempted to initiate and then consummate the sale of the marina to Brewer. Nor is there any question that Management was acting as a "broker" when it performed these functions—Management itself characterizes its business as that of a "business broker" or "marina broker." The real question, then, is whether Management was acting as a *real estate* broker for purposes of the Connecticut statute. We hold that it was and that, accordingly, Management was properly barred as a matter of law from recovering brokerage commissions stemming from its involvement in the aborted sale of the marina to Brewer.

The district court determined that "[t]he inference that [Management] rendered real estate brokerage services to Marina is irresistible." Prior to the execution of the listing agreement, Management was retained to

appraise the "physical assets" of Marina, the "land, buildings, docks, piers, floats, electrical, water, sanitary, blacktop, dredging, etc." The initial appraisal was raised almost $175,000 after discussion regarding the value of the real estate and the main building. The record shows that the final $1,500,000 asking price was determined by reference to the $1,496,000 appraisal, as was the $1,200,000 offer by Brewer. The deposition of Robert Wheeler, Management's secretary and treasurer, indicates clearly that the appraisal was of Marina's physical assets and not its value as a business. He noted specifically that Management employs an entirely different procedure for the appraisal of marinas as going businesses, a procedure he characterized as the "income approach." The record shows that Management made no effort to appraise the business value of Marina in anticipation of the sale; both the initial and final appraisals submitted by Management to Marina included the notation that "[e]arnings have not been capitalized to use as a check on our value determination." In addition, the deposition of R. O. Palmer, owner of Marina, makes it clear that Brewer was going to receive the deed to the land and buildings rather than stock in the corporation and that Palmer did not consider offering stock to Brewer. Responding to the question whether he thought he was selling Brewer a business, Palmer said that he was selling "assets and that [Brewer] would have the right to run a business there." Finally, Brewer specifically requested that the sales agreement include no reference to Marina's trade name or "good will," asserting that he had "no interest" in such items. Thus, the nature of the sale was plain not only to Marina and Brewer, but to Management as well. That Management had previously brokered sales of marinas both as businesses and physical entities makes the nature of the understanding among the parties all the more obvious.

Given this, we think that a Connecticut court would bar recovery by Management. Connecticut's real estate broker licensing scheme, Conn. Gen. Stat. § 20-311 *et seq.*, is based on the notion that "[a] real estate broker or salesman occupies a position of superiority and influence which invites the trust and confidence of those who deal with him. He is often entrusted with substantial sums of his client's money." *Cyphers* v. *Allyn*, 142 Conn. 699, 706, 118 A.2d 318, 322 (1955). The license requirements "furnish supervision and regulation of the real estate business and make possible the elimination of the incompetent and unscrupulous agent." *Id.* at 704, 118 A.2d at 321. The Connecticut court has held that the statute is "remedial in nature and for that reason is to be liberally construed in order to accomplish its purpose." *Metropolitan Casualty Co.* v. *Billings*, 150 Conn. 603, 608, 192 A.2d 541, 543 (1963).

Conn. Gen. Stat. § 20-311(a) defines "real estate broker" to include "any . . . corporation which, for another and for a fee . . . lists for sale, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of, an estate or interest in real estate. . . ." The definition of "engaging in the real estate business" contains a parallel provision. Conn. Gen. Stat. § 20-311(c). The statute prohibits acting as a real estate broker without a license, bars recovery or compensation to those who do so, and exposes them to criminal penalties. Conn. Gen. Stat. §§ 20-312, 325a, 325. The list of exceptions to the statutory requirements makes no mention of "business brokers" or "marina brokers." Conn. Gen. Stat. § 20-329. Finally, during its consideration of these statutory provisions, the Connecticut legislature was aware of the practice of brokering the purchase and sale of commercial and industrial properties. *See* 16 Conn. H.R. Proc., pt. 4, 1973 Sess., pp.

1518-19; Hearing before the Joint Standing Committee on Insurance and Real Estate, Conn. Gen. Assembly, 1971 Sess., pp. 229-32. We find no ambiguity in either the wording of the statute or the intent of the Connecticut legislature and we see no reason to think that the Connecticut court would, if presented with the issue, find differently. *See* Conn. Gen. Stat. § 1-1; *Colli* v. *Real Estate Commission*, 169 Conn. 445, 450, 364 A.2d 167, 171 (1975); *Metropolitan Casualty Co.* v. *Billings, supra*, 150 Conn. at 608, 192 A.2d at 543. It is, of course, well established in Connecticut that criminal statutes are to be strictly construed, but this canon of statutory construction does not prevent the application of common sense to the language so as to effectuate the evident intent of the lawmakers. *See State* v. *Pastet*, 169 Conn. 13, 21-22, 363 A.2d 41, 46 (1975); *State* v. *Sober*, 166 Conn. 81, 91, 347 A.2d 61, 67 (1974); *State* v. *Archambault*, 146 Conn. 605, 607-08, 153 A.2d 451, 452 (1959).

Despite this lack of ambiguity, Management seizes upon the fact that the Connecticut courts have not decided this issue and argues that if and when they do, they will decide according to the so-called "New York rule," under which unlicensed brokers may sometimes recover commissions for negotiating the transfer of going businesses even if a transfer of real estate is also involved. Management claims that the negotiations around the Marina sale involved a "blend" of business and real estate brokerage services of the type covered by this rule. Brewer, on the other hand, argues that the Connecticut court would adopt the "New Jersey rule," a rule somewhat stricter than New York's. The district court held that recovery would be barred under either rule, thus eliminating the need to choose between them. We agree.

For purposes of this decision, we need not, and do not, determine either New York or New Jersey law. While the

"New York rule" itself is far from clear, it appears to be that a broker who lacks a real estate broker's license may under certain circumstances recover a brokerage commission for negotiating the transfer of a going business despite the fact that real estate forms an element of the transaction. *See* N.Y. Real Prop. Law §§ 440, 440-a, 442-d; *Weingast* v. *Rialto Pastry Shop, Inc.*, 243 N.Y. 113, 152 N.E. 693 (1926). New York courts have interpreted the statutes and the *Weingast* case to mean that an unlicensed broker may recover a commission when real estate is an "incidental," and sometimes even "significant," though not "dominant," feature of the transaction. A license is required, however, when real estate is the "dominant" feature. *See Myer* v. *Jova Brick Works, Inc.*, 38 A.D.2d 615, 617, 326 N.Y.S.2d 321, 324 (3rd Dep't 1971); *Sorice* v. *DuBois*, 25 A.D.2d 521, 267 N.Y.S.2d 227 (1st Dep't 1966); *Dodge* v. *Richmond*, 5 A.D.2d 593, 595, 173 N.Y.S.2d 786, 788 (1st Dep't 1958); *Baird* v. *Krancer*, 138 Misc. 360, 362, 246 N.Y.S. 85, 88 (Sup. Ct. N.Y. County 1930); *see also Backar* v. *Western States Producing Co.*, 547 F.2d 876, 883 n.11 (5th Cir. 1977) ("When real estate is not the dominant feature of the sale of a business, no real estate license is usually required under New York law."); *Flammia* v. *Mite Corp.*, 401 F.Supp. 1121, 1134 (E.D.N.Y. 1975) (N.Y. Real Prop. Law § 442-d prohibits recovery of brokerage commissions when the purchaser of a business has real estate as the "chief object" of that purchase), *aff'd mem.*, 553 F.2d 93 (2d Cir. 1977).

The "New Jersey rule" may be stated in even briefer fashion: it appears to hold that a broker lacking a real estate broker's license may not recover a commission if the transaction involves *any* real estate. *See* N.J. Rev. Stat. §§ 45:15-1, 15-2, 15-3; *Kenney* v. *Paterson Milk & Cream Co.*, 110 N.J.L. 141, 164 A. 274 (1933).

Management's final appraisal of Marina's physical assets valued land at $394,500 and buildings at $590,487. In

addition, other physical assets, permanently affixed to the marina, included four main docks and piers valued at $60,000, travel lift slots valued at $32,000, and bulkheads valued at $152,000. From this, we think that, even if § 20-325a were interpreted to be the same as the so-called "New York rule," the Connecticut court would bar Management's recovery. The real estate was neither "incidental" nor merely "significant" but was the "dominant" feature of the transaction.

We reject Management's other arguments, particularly the contention that Connecticut's statute, as here interpreted, unconstitutionally burdens interstate commerce by depriving marina brokers of a livelihood and businesses of necessary brokerage services. *See Complete Auto Transit Inc.* v. *Brady*, 45 U.S.L.W. 4259 (U.S. Mar. 8, 1977); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Goldsmith* v. *Walker Manufacturing Co.*, 295 F.Supp. 1037, 1040 (E.D. Wis. 1969); Conn. Gen. Stat. § 20-317 (providing for the licensing of non-residents and the recognition by Connecticut of licenses granted to non-residents by other states).

Viewing the record in the light most favorable to Management, *see United States* v. *Diebold*, 369 U.S. 654, 655 (1962), it is clear to us that the undisputed facts justified entry of summary judgment on the basis of Brewer's statutory defense. The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARINA MANAGEMENT CORP.	:	
	:	
vs.	:	Civil No: B-75-297
	:	
JOHN D. BREWER, JR.	:	

MEMORANDUM OF DECISION ON
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant has moved for summary judgment, pursuant to Fed. R. Civ. P. 56, in this lawsuit over the nonpayment of a broker's commission.

The following undisputed facts have been established by the pleadings, exhibits, and deposition testimony that have been submitted to the Court. Plaintiff is a New York corporation engaged in the business of brokering the purchase and sale of boatyards and marinas. Plaintiff does not have a Connecticut real estate broker's license. Defendant is a Connecticut resident. Jurisdiction is predicated on diversity of citizenship. 28 U.S.C. Sec. 32. The amount in controversy exceeds $10,000.

The origin of the present dispute is an agreement between tween plaintiff and Stratford Marina, Inc. (Marina) that authorized plaintiff, as Marina's exclusive agent, to offer one-half of a marina at Stratford, Connecticut for sale at an asking price of $850,000. Plaintiff was further authorized to negotiate the leasing of the other half of the marina. In this agreement, which was executed by a letter dated February 11, 1974, Marina agreed to pay plaintiff a brokerage commiss sion of 10% of the total sales price.

In March, 1974, plaintiff commenced discussions with the defendant concerning the sale and leasing of the marina. In the course of these negotiations, plaintiff transmitted offers from the defendant to Marina on three different occasions. The third offer, which was for the purchase of only one-half of the marina, led to the preparation of two drafts of a proposed purchase agreement

On April 11,1975 negotiations between Marina and defendant in connection with this third offer broke down, and Marina instructed plaintiff to cease further negotiations with defendant. At this time, Marina also terminated the exclusive brokerage agreement with plaintiff. After that date, the only authority plaintiff had to act on Marina's behalf was a verbal understanding that the plaintiff had the right to offer the marina for sale on a non-exclusive basis. Plaintiff continued to negotiate with defendant after Marina terminated plaintiff's exclusive agreement. In September, 1975, plaintiff conveyed to Marina another offer from defendant. Negotiations in connection with this offer eventually broke down, and the sale of the marina never occurred.

Apart from these undisputed facts, plaintiff alleges that on or about March 15, 1974, defendant agreed to assume the obligations of Marina with regard to plaintiff's brokerage commission, and disputes plaintiff.s contention that it is entitled to a fee.

There are sufficient undisputed facts to permit a ruling on one ground that defendant advances as a basis for summary judgment.[1] That ground is defendant's contention that plaintiff is barred from recovering a commission because plaintiff does not have a Connecticut real estate broker's license.

Connecticut General Statutes Sec. 20-325(a) provides:

> No person who is not licensed under the provisions of this chapter, . . . shall commence or bring any action in any court of this state, . . . to recover any commission, compensation or other payment in respect of any act done or service rendered by him, the doing or rendering of which is prohibited under the provisions of this chapter except by persons duly licensed under this chapter..

Chapter 20 prohibits all persons from rendering the services of a real estate broker or salesman without first obtaining the appropriate real estate license. Conn. Gen. Stat. Sec. 20-312. There can be no question that plaintiff was acting as a broker when it agreed to assist Marina in locating an acceptable buyer. The question is whether plaintiff was acting as a ***real estate*** broker. If it was, then this suit for recovery of a commission is barred by Conn. Gen. Stat. Sec. 20-325(a),[3]

since it is undisputed that plaintiff did not have a Connecticut real estate broker's license when it endeavored to assist in the sale of the marina.

Plaintiff claims, however, that Conn. Gen. Stat. Sec. 20-325(a) is inapplicable to this case, and that it was not required to have a real estate license because its efforts with regard to the marina were those of a business broker, not those of a real estate broker.

Plaintiff's contention that Marina hired it to negotiate the sale as a business broker, rather than as a real estate broker, is refuted by the record. Prior to execution of the brokerage agreement, Marina commissioned plaintiff to appraise Marina's "physical assets." Those assets included "land, buildings, docks, piers, floats, electrical, water, sanitary, blacktop, dredging, etc." When Marina and plaintiff executed the brokerage agreement, the specified asking price, which had been based on the appraisal, included all of Marina's "physical assets."There is no evidence that plaintiff was ever asked to appraise the value of Marina as a going business, or that it was hired to broker anything but the sale of Marina's property. In drafting the proposed agreements resulting from one of defendant's purchase orders, Marina was directed by defendant to exclude any mention of its good will or trade name as part of the draft agreement. Defendant asserted that he had "no interest" in those items.

The inference that plaintiff rendered real estate brokerage services to Marina is irresistible. Even conceding this fact, however, plaintiff contends that it is still entitled to collect a commission on the theory that it rendered a blend of business and real estate brokerage services to Marina. Plaintiff directs the Court's attention to several cases that have allowed unlicensed brokers to recover commissions in jurisdictions with statutes similar to Conn. Gen. Stat. Sec. 20-325(a).

The cases to which plaintiff refers rely on the so-called "New York rule," a doctrine developed in the context of litigation by unlicensed brokers to recover commissions. The "rule" is essentially that an unlicensed broker who negotiates the transfer of a going business may recover a commission despite the fact that real estate forms an incidental part of

the transaction. See, *e.g.*, *Weingast v. Rialto Pastry Shop, Inc.*, 243 N.Y. 113, 152 N.E. 693 (1926). The "rule" has been construed most broadly to allow an unlicensed broker to recover a commission when the real estate "may be a significant though not a dominant feature of the transaction." *Dodge v. Richmond*, 173 N.Y.S.2d 786 (1958).

Defendant responds by citing cases in other jurisdictions that adhere to the so-called "New Jersey rule," which bars an unlicensed broker's recovery of a commission if the disputed transaction involved *any* real estate. See, *e.g.*, *Kenney v. Paterson Milk & Cream Co., Inc.*, 110 N.J.L. 141, 164 A. 274 (1933).

Although the New Jersey rule seems more consistent with the apparent strictness of Conn. Gen. Stat. Sec. 20-325(a), this Court need not resolve the state law question to decide the pending case. Under either the New Jersey or New York rule, Conn. Gen. Stat. Sec. 20-325(a) bars plaintiff from recovering a commission. Even under the "New York rule," suit for a commission could not be maintained because the contemplated sale was for real assets and not for a going business, and even if the sale could have been viewed as that of a going business, the real estate was surely not an incidental part of the transaction. The record shows that the bulk of the property Marina hired plaintiff to offer for sale consisted of land and buildings and other improvements.

For the foregoing reasons, defendant's motion for summary judgment is granted.

Dated at New Haven, Connecticut, this 7th day of April, 1977.

Jon O. Newman

Jon O. Newman
United States District Judge

FOOTNOTES

1. Defendant also claims that it is entitled to summary judgment on the ground that plaintiff's commission was predicated on bringing defendant and Marina to a final agreement. Resolution of this claim turns on facts that are not clearly established at this stage of the litigation. Accordingly, summary judgment on this ground is not appropriate.

2. Since the federal jurisdiction in this case rests on the diversity of citizenship between the parties, the Court must apply Connecticut state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Hence, the prohibition of Conn. Gen. Stat. Sec. 20-325(a) against suits "in any court of this state," when applied by a federal court in a diversity suit, must be construed to bar such suits in federal court.

Constitutional Provision, Statutes and Federal Rule Involved

United States Constitution

Fifth Amendment

No person . . . shall be deprived of life, liberty, or property, without due process of law; . . .

Connecticut General Statutes

Sec. 20-311. Definitions

As used in this chapter:

(a) As used in this chapter "Real estate broker" means person, partnership, association or corporation which, for another and for a fee, commission or other valuable consideration, lists for sale, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of, an estate or interest in real estate, or collects or offers or attempts to coolect rent for the use of real estate, or negotiates or offers or attempts to negotiate a loan secured or to be secured by a mortgage or other encumbrance upon or transfer of real estate. "Real estate broker" also includes any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, upon commission, upon a salary and commission basis or otherwise to sell such real estate, or any parts thereof, in lots or other parcels, and who sells or exchanges, or offers, attempts or agress to negotiate the sale or exchange of, any such lot or parcel of real estate. Said term shall also include any person who engages in the business, for a fee, in connection with any contract whereby he undertakes to promote the sale of real estate through the listing of such property with a referral service, or in a publication issued primarily for such purpose or for referral of information concerning properties to licensed real estate brokers or both.

(c) As used in this chapter "engaging in the real estate business means acting for another and for a fee, commission or other valuable consideration in the listing for sale, selling, exchanging, buying, or renting, or offering or attempting to negotiate a sale, exchange, purchase or rental of, an estate or interest in real estate, or collecting upon, or offering or attempting to negotiate, a loan secured or to be secured by a mortgage or other encumbrance upon or transfer of real estate.

Sec. 20-312. License required

No person shall act as real estate broker or real estate salesman without a license issued by the commissioner, unless exempted by the provisions of this chapter. No partnership, association or corporation shall be granted a license, unless every member or officer of such partnership, association or corporation who actively participates in its real estate brokerage business holds a license as a real estate broker, and unless every employee who acts as salesman for such partnership, association or corporation holds a license as a real estate salesman. A partnership, association or corporation shall designate in its application the individual who is to serve as broker under the license.

Sec. 20-325. Engaging in business without license

Any person who engages in the business of real estate broker or salesman, without obtaining a license as herein provided, shall be fined not more than five hundred dollars or imprisoned not more than six months or both, and shall be ineligible to obtain a license for one year from the date of conviction of such offense, except that the commission, in its discretion, may grant a license to such person with such one-year period upon application and after a hearing thereon.

Sec. 20-325a. Actions to recover commissions arising out of real estate transactions

(a) No person who is not licensed under the provisions of this chapter, and who was not so licensed at the time he performed the acts or rendered the services for which recovery is sought, shall commence or bring any action in any court of this state, after October 1, 1971, to recover any commission, compensation or other payment in respect of any act done or service rendered by him, the doing or rendering of which is prohibited under the provisions of this chapter except by persons duly licensed under this chapter.

New Jersey Statutes Annotated

45:15-1. License required to engage in business of real estate broker pr salesman

No person shall engage either directly or indirectly in the business of a real estate broker or salesman, temporarily or otherwise, and no person shall advertise or or represent himself as being authorized to act as a real estate broker or salesman, or to engage in any of the activities described in section 45:15-3 of the Revised Statutes, without being licensed so to do as hereinafter provided.

45:15-2 "Engaging in business" defined

Any single act, transaction or sale shall constitute engaging in business within the meaning of this article.

45:15-3 "Real estate broker" and "real estate salesman" defined; license required to bring action for compensation

A real estate broker, for the purposes of this article,[1] is defined to be a person, firm or corporation who, for a fee, commission or other valuable consideration, or by reason of a promise or reasonable expectation thereof,

lists for sale, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of real estate or an interest therein, or collects or offers or attempts to collect rent for the use of real estate or solicits for prospective purchasers or assists or directs in the procurement of prospects or the negotiation or closing of any transaction which does or is contemplated to result in the sale, exchange, leasing, renting or auctioning of any real estate or negotiates, or offers or attempts or agrees to negotiate a loan secured or to be secured by mortgage or other encumbrance upon or transfer of any real estate for others, or any person who, for pecuniary gain or expectation of pecuniary gain conducts a public or private competitive sale of lands or any interest in lands. In the sale of lots pursuant to the provisions of this article, the term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary, or upon a salary and commission, or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate.

A real estate salesman, for the purposes of this article, is defined to be any person who, for compensation, valuable consideration or commission, or other thing of value, or by reason of a promise or reasonable expectation thereof, is employed by and operates under the supervision of a licensed real estate broker to sell or offer to sell, buy or offer to buy or negotiate the purchase, sale or exchange of real estate, or offers or attempts to negotiate a loan secured or to be secured by a mortgage or other encumbrance upon or transfer of real estate, or to lease or rent, or offer to lease or rent any real estate for others, or to collect rents for the use of real estate, or to solicit for prospective purchasers or lessees of real estate, or who is employed by a licensed real estate

broker to sell or offer to sell lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise to sell real estate, or any parts thereof, in lots or parcels.

No person, firm, partnership, association or corporation shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed real estate broker at the time the alleged cause of action arose.

[1] Sections 45:15-1 to 45:15-29.

New York Real Property Law

Sec. 440. Definitions

Whenever used in this article "real estate broker" means any person, firm or corporation, who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys, rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate, or offers or attempts to negotiate, a loan secured or to be secured by a mortgage or other encumbrance upon or transfer of real estate. In the sale of lots pursuant to the provisions of article nine-a of this chapter, the term "Real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lotts or other parcels of real estate,at a stated salary, or upon a commission, or upon a salary and commission, or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate.

"Real estate salesman" means a person employed by a licensed real estate broker to list for sale, sell or offer for sale, at auction or otherwise, to buy or offer to buy or to negotiate the purchase or sale or exchange of real estate, or to negotiate a loan on real estate, or to lease or rent or offer to lease, rent or place for rent any real estate, or collects or offers or attempts to collect rent for the use of real estate for or in behalf of such real estate broker.

Sec. 440-a License required for real estate brokers and salesmen

No person, co-partnership or corporation shall engage in or follow the business or occupation of, or hold himself or itself out or act temporarily or otherwise as a real estate broker or real estate salesman in this state without first procuring a license therefor as provided in this article. No person shall be entitled to a license as a real estate broker under this article, either as an individual or as a member of a co-partnership, or as an officer of a corporation, unless he is over the age of twenty-one years, a citizen of the United States or has declared his intention of becoming a citizen, and if such person does not become a citizen within seven years after having so declared his intention, the department may revoke or refuse to renew his license. No person shall be entitled to a license as a real estate salesman under this article unless he is over the age of eighteen years. No person shall be entitled to a license as a real estate broker or real estate salesman under this article who has been convicted in this state or elsewhere of a felony, and who has not subsequent to such conviction received executive pardon therefor or a certificate of good conduct from the parole board, to remove the disability under this section because of such conviction.

Constitutional Provision, Statutes and Federal Rule Involved

Sec. 442-d. Action for commissions: license prerequisite

No person, copartnership or corporation shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose.

Sec. 442-e. Violations

1. Misdemeanors: triable in court of special sessions. Any person who violates any provision of this article shall be guilty of a misdemeanor. The commission of a single act prohibited by this article shall constitute a violation thereof. All courts of special session, within their respective territorial jurisdictions, are hereby empowered to hear, try and determine such crimes, without indictment, and to impose the punishments prescribed by law therefor.

Federal Rules of Civil Procedure

Rule 56
SUMMARY JUDGMENT

(b) For Defending Party. A party against whoma claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment shall be rendred forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with af-

Constitutional Provision, Statutes and Federal Rule Involved

fidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.